IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI

Before Sh. Saktijit Dey, Vice-President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 485/Del/2021 : Asstt. Year: 2016-17

Concentrix Daksh Services India P. Ltd., DLF IT SEZ, Building No. 14, Tower-D, 17th Floor, DLF Cyber City, Sector 24 & 25A, DLF Phase-III, Gurgaon, Haryana-122002	Vs	ACIT, Circle-4(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AABCD4187D		

Assessee by : Sh. Ankul Goyal, Adv.
Revenue by : Sh. Rajesh Kumar, CIT(DR)

Date of Hearing: 06.12.2023		**Date of Pronouncement: 05.03.2024**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 31.03.2021 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. The assessee has raised the following grounds of appeal:

"1. Ground No. 1 - On the facts and circumstances of the case and in law, the order of learned DRP/AO is bad in law and against principles of law which is liable to be set aside

1.1 The ground is general in nature.

Transfer pricing adjustment
Ground No. 2 - Transfer pricing adjustment in relation to notional interest on overdue receivables amounting INR 1,41,79,300

*2.1 That on the facts of the case and in law, the Hon'ble DRP/Learned AO/Learned Transfer Pricing Officer (*TPO) has erred in not appreciating the fact that accounts receivable/*

accounts payable arising out of the international transaction of provision of IT enabled services by the Appellant to its Associated Enterprises ("AEs"), are closely linked to the international transaction and since the Hon'ble DRP/Learned AO/Learned TPO has determined the primary international transaction at an arm's length price after considering working capital adjusted margins of comparable companies, no separate adjustment can be made for such inter-company receivables and the same has been favourably upheld by the Hon'ble ITAT in Appellant's case for AY 2015-16 (ITA No. 4453/Del/2019).

2.2 That on the facts of the case and in law, the Hon'ble DRP/Learned AO/Learned TPO has erred in not appreciating the fact that since the weighted average period of realization of inter-company invoices of 43.59 days is less than the credit period of 60 days as stipulated in the intercompany agreement, no TP adjustment is warranted.

2.3 That on the facts of the case and in law, the Hon'ble DRP/Learned AO/Learned TPO has erred in re-characterizing the inter-company receivables as a separate international transaction of unsecured loan and imputing interest on such transaction.

2.4 That on the facts of the case and in law, the Hon'ble DRP/Learned AO/Learned TPO has erred in making the adjustment despite Appellant being a debt free company.

2.5 That on the facts of the case and in law, the Hon'ble DRP/Learned AO/Learned TPO has erred in making the adjustment even though no interest was charged for delayed realization from third party customers as well.

2.6 That on the facts of the case and in law, the Hon'ble DRP/Learned AO/Learned TPO has erred in not considering the period of 90 days, as provided under section 92CE of the Income Tax Act, 1961 read with Rule 10CB of the Income Tax Rules, 1962, for the purpose of computing the subject adjustment.

2.7 That on the facts of the case and in law, the Hon'ble DRP/Learned AO/Learned TPO has erred, by not giving the benefit of set off the outstanding payables and advances from AEs while computing the subject TP adjustment.

2.8 That on the facts of the case and in law, the Hon'ble DRP/Learned AO/Learned TPO has erred, by considering the interest rate of LIBOR plus 400 basis points instead of LIBOR plus 200 basis points, as stipulated in the intercompany agreement, for computing the subject adjustment.

Corporate Tax Adjustments

3. Ground No. 3 - Disallowances on account of Capitalization of purchase of indoor wireless ports amounting to INR 1,43,164

3.1 On the facts and circumstances of the case and in law, the Hon'ble DRP/Learned AO has erred in making a disallowance of INR 1,43,164 by capitalizing the cost of INR 1,68,429 incurred towards purchase of indoor wireless ports and allowing depreciation thereon at the rate of 15%.

3.2 On the facts and circumstances of the case and in law, the Hon'ble DRP/Learned AO has erred in not appreciating the fact that the expenditure incurred for purchase of indoor wireless ports was for replacement of parts of an existing asset and not for acquisition of new plant and machinery.

The Appellant has filed a rectification application before the Hon'ble DRP for rectification of the directions issued in respect of the aforesaid ground and it shall not be pressed where the application is allowed by the Hon'ble DRP.

4. Ground No. 4 - Addition on account of allocation of expenses between SEZ unit and non-SEZ units, amounting to INR 7,51,20,905.

4.1 On the facts and circumstances of the case and in law, the Hon'ble DRP/Learned AO has erred in making an addition of INR 7,51,20,905 on account of reallocation of direct as well as common cost between SEZ unit and non-SEZ units, by alleging that claim of deduction under section 10AA of the Act made by the Appellant is excessive, despite that fact that deduction claimed by the Appellant in earlier years was accepted by the Respondent.

4.2 On the facts and circumstances of the case and in law, the Hon'ble DRP/Learned AO has erred in allocating the direct expenses of the SEZ and non-SEZ units ('taxable units') and not appreciating the fact that separate books of account have been prepared for SEZ unit, which were duly certified by the auditor.

4.3 On the facts and circumstances of the case and in law, the Learned AO has erred in not accepting the turnover method for distribution of common expenses between SEZ and taxable units.

4.4 On the facts and circumstances of the case and in law, the Hon'ble DRP/Learned AO had grossly erred in relying on the decision of Hon'ble Supreme Court in the case of CIT vs Bilahari Investment Pvt. Ltd. and reproduced only a part of the extract of the Supreme Court ruling referred to by the Hon'ble Delhi

High Court in the case of CIT vs. EHPT India (P.) Ltd. [2013] 350 ITR 41 (Delhi).

4.5 Without prejudice to above, the Learned AO has erred in applying an incorrect ratio to reallocate the expenses between the SEZ and taxable units.

4.6 On the facts and circumstances of the case and in law, the Hon'ble DRP, has erred in not adjudicating sub-ground 4.5 above relating to application of incorrect ratio by the Learned AO to reallocate the expenses between the SEZ and taxable units.

The Appellant has filed a rectification application before the Hon'ble DRP/Learned Respondent for rectification of the above mistake and the aforesaid ground shall not be pressed where the application is allowed by the Hon'ble DRP/Learned Respondent.

Ground No. 5 - Addition on account of increase in Capital Reserve amounting to INR37,82,75,381

5.1 On the facts and circumstances of the case and in law, the Hon 'ble DRP/Learned AO has erred in making an addition of INR 37,82,75,381 representing voluntary contribution received by the Appellant from group company as reimbursement of the amount paid on cash settlement under the employee award program. The said amount had been treated by the Appellant as a capital receipt and credited to the Capital Reserve.

5.2 On the facts and circumstances of the case and in law, the Learned AO has erred in holding that the amount of INR 37,82,75,381 received by Appellant from its group company is a revenue receipt taxable in the hands of the Appellant.

6. Ground No. 6 - Allowance of deduction of INR 26,78.37,118 paid to the employee towards compensation for cancelled stock awards (part of aggregate payout of INR 37,82,75,381)

6.1On the facts and circumstances of the case and in law, the Learned AO has erred in not following the directions of the Hon'ble DRP with respect to the verification of the additional claim made by the Appellant for an expenditure of INR 26,78,37,118 (being amount paid to the employees towards cash settlement of the employee award program) incurred during the financial year relevant to the subject Assessment Year but disallowed in the return of income as a prior period expenditure.

6.2 Without prejudice to above, on the facts and circumstances of the case and in law, the Learned AO has erred in not appreciating the fact that the liability for payment of INR 37,82,75,381 had crystallized in the subject year.

6.3 Without prejudice to the above, on the facts and circumstances of the case and in law, the Learned AO has erred in not considering the fact the aforesaid payments would in any case be allowable under section 43B of the Act on payment basis.

The Appellant has filed a rectification application before the Learned Respondent for rectification of the mistake of not following the direction of the Hon'ble DRP and the aforesaid ground shall not be pressed where the application is allowed by the Learned Respondent.

7. Ground No. 7 - Levy of interest under section 234A of the Act

7.1 On the facts and circumstances of the case and in law, the Learned AO has erred in charging interest under section 234A of the Act amounting to INR 26,24,780.

The Appellant has filed a rectification application before the Learned Respondent for rectification of the above mistake and the aforesaid ground shall not be pressed where the application is allowed by the Learned AO.

8. Ground No. 8- Levy of interest under section 234B of the Act

8.1 On the facts and circumstances of the case and in law, the Learned AO has erred in charging excess interest under section 234B of the Act.

The Appellant has filed a rectification application before the Learned Respondent for rectification of the above mistake and the aforesaid ground shall not be pressed where the application is allowed by the Learned AO.

9. Ground No. 9 - Initiation of penalty proceedings under section 271(1)c)

9.1 On the facts and circumstances of the case and in law, the Learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act against the Appellant on account of the above adjustments made in the assessment order."

3. The grounds to be adjudicated are,

1. Interest on receivables
2. Capitalization of wireless ports
3. Allocation of expenses
4. Capital reserves and
5. Employee compensation

4. At the outset, the ld. AR argued referring to the submissions made before the revenue authorities.

5. Against the arguments of the ld. AR, the ld. CIT DR submitted his arguments in writing which is reproduced as under:

> "Issue No 1. (Revised Grounds of Appeal No. 2, 2.1, 2.2 & 2.3) Interest on delayed receivables
>
> In this case, the AO/TPO has made addition of Rs. 7,66,20,461/- on account of interest on delayed receivables assessee has raised the following grounds with respect to international transaction on Outstanding receivables.
>
> - Outstanding receivable is not an international transaction.
> - Amount receivable/payable arising out of international transaction of provision of ITS are closely linked and as TPO has determined the International transactions at ALP considering working capital adjusted margins of comparable company's, no separate adjustment should be made.
> - Working capital adjustment takes into account the impact of outstanding receivables on profitability and therefore, no further imputation of interest ought to be warranted
> - No interest is to be charged on delayed receivables as assessee is a debt free company
> - Receivables outstanding ought to be netted-off with trade payables to AE.
>
> Further the assessee has also relied upon the order of the Hon'ble High Court in the case of PCIT vs. Kusum Healthcare Pvt. Ltd. 398 ITR 66 (Delhi 2017). All the grounds raised by assessee aren't tenable because of the following reasons.

A. The AO/TPO order on Interest on delayed receivables fulfills all the conditions laid down by the Hon'ble High Court decision in the case of PCIT vs. Kusum Healthcare Pvt. Ltd. 398 ITR 66 (Delhi 2017) and accordingly the case is covered in favour of the department.

(i). At the outset, it is humbly submitted that why the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. is not applicable to the facts of the case has been discussed in detail by the Hon'ble DRP in its order. However, without prejudice to the above, it is stated that even if the Hon'ble Bench follows the decision in the case of Kusum Healthcare Pvt. Ltd., even then the AO in the instant case has clearly made out a case for charging of interest on receivables by following the conditions laid down by the Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd.

The operative part of the decision in the case of Hon'ble Delhi High Court is very relevant and reproduced below:-

"10. The court is unable to agree with the above submissions. The inclusion in the Explanation to section 92B of the Act of the expression "receivables" does not mean that dehors the context every item of "receivables" appearing in the accounts of an entity, which may have dealings with foreign associated enterprises would automatically be characterized as an international transaction. There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee will have to be studied. In other words, there has to be a proper inquiry by the Transfer Pricing Officer by analyzing the statistics over a period of time to discern a pattern which would indicate that vis-a-vis the receivables for the supplies made to an associated

enterprise, the arrangement reflects an international transaction intended to benefit the associated enterprise in some way.

11. The court finds that the entire focus of the Assessing Officer was on just one assessment year and the figure of receivables in relation to that assessment year can hardly reflect a pattern that would justify a Transfer Pricing Officer concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterized the transaction. This was clearly impermissible in law as explained by this court in CIT v. EKL Appliances Ltd. [2012] 209 Taxman 200/345 ITR 241/345 ITR 241 (Delhi).

(ii). From the perusal of the above, following facts emerge, which were considered to be relevant by the Hon'ble High Court for making adjustment on account of delayed receivables by the TPO on account of transaction incurred by Kusum Healthcare Pvt. Ltd.

(1) The Hon'ble High Court has stated that factor responsible for the delay have to be investigated on case to case basis.

(2) Proper inquiry/examination has to be conducted by the PO by analyzing the statistics over a period of time to discern a pattern which would indicate that viz-a-viz the receivables, an arrangement which reflects international transactions intended to benefit the Associated Enterprises.

(3) In the case of Kusum Healthcare Pvt. Ltd., the Hon'ble Court has remarked that the entire focus of the AO was just on one assessment year and AO could not reflect a pattern to justify that the receivable constitute international transactions by itself.

(4) In that case, the Hon'ble High Court held that the assessee has already factored the impact of receivables on the working capital and adjustments on the basis of outstanding receivables would have distorted the picture. Also, the Hon'ble High Court has held that the impact on the working capital of the assessee has to be studied.

(iii) If we analyze the transactions of the instant case then we will find that the AO has clearly been able to made out a case in line with the Hon'ble Delhi High Court decision in the case of Kusum Healthcare Pvt. Ltd. The facts are mentioned below:-

(1) The AO/TPO/DRP has examined the transactions year wise and the delay in receipt of payment for supply of services, has been worked out separately, after duly allowing the 30/60 days credit period to the assessee company.

(2) In the instant case, even though the AO/TPO mentioned delay in receipt of payments only for one year but the facts of the case, (as mentioned below) clearly reflects a pattern spread over at least 3 years in the past which shows that the delay in receivable has been intentionally made by the assessee company to provide benefit to its AE. For ready reference, the addition made by the TPO/AO/DRP for delay in respect of payments to be received from AEs for A.Y. 2015-16 and A.Y. 2017-18 is mentioned below for the kind perusal of the Hon'ble Bench.

Year wise pattern of delay in receivables in the case of M/s Concentrix Daksh Services India Pvt. Ltd. are given below-

Year wise pattern of delay in receivables in the case of Concentrix Daksh Services India Pvt. Ltd.				
S. No	A.Y.	Whether TPO treated outstanding receivables as separate International transaction	Interest Charged by TPO @	DRP's Directions

1	2015-16	Yes	LIBOR+400 basis points	LIBOR+400 basis points
2	2016-17	Yes and invoice wise analysis done	LIBOR+400 basis points	LIBOR+400 basis points
	2017-18	Yes and invoice wise analysis done	LIBOR+400 basis points	LIBOR+400 basis points

(3) From the perusal of the above table, it is clear that there is delay in receivables for the years F.Y. 2015-16 to F.Y. 2017-18. Not only this, in these years, the AO/TPO has examined year wise delays and based on the examination of invoices/delays in the above cases for the respective years, the AO/TPO/DRP has computed the delays after duly considering / allowing normally the credit period of 30/60 days

4. Thus as mentioned in the decision of Kusum Healthcare Pvt. Ltd., in the instant case the AO/TPO has clearly shown a pattern by analyzing the statistics over period of time, which is spread over more than one year and based on that pattern, the AO/TPO has come to conclusion that their exist an arrangement in the instant case which is clearly an international transactions as defined in explanation (i)(c) of section 92B of the IT Act, as amended by the Finance Act 2012 with retrospective effect from 01.04.2002. The above noted arrangement which is, clearly an international transaction has been entered into by the assessee company regularly at least from F.Y. 2011-12 onwards to benefit its Associated Enterprises.

(iv) Further in the above noted case, as the period of delay as considered by the TPO/DRP is within the financial year, accordingly it cannot be said that that the assesseee has already factored the impact of receivable on the working capital, as claimed by the assessee. Thus, it is humbly submitted that if the invoices are raised within the year and the proceeds are also realized within the year only but beyond the stipulated period of credit, then the period of the delay will not come within the ambit of working capital adjustment because working capital

adjustment are made with reference to the opening and closing basis as on 1st April and on 31st March of the respective year. For example the transactions, let us say, which occur and gets complete between, 2nd April and 30th March, during the financial year, even though these are delayed will not be factored in the working capital adjustment.

(v) It is also humbly submitted that the argument that all the delays in receipt of receivables are factored in working capital adjustment cannot be true because normally it may be impossible for the company to anticipate the delays invoice wise. Like in the instant case, (as no invoice wise information is provided to TPO) the delays are usually confined within a financial year and it is simply incomprehensible to understand that how such varying delays was factored in working capital by the assessee company.

Further, if the company says that it is able to anticipate the delays then in all probability it should be treated as an arrangement or an understanding between the company and its AEs and the underlying aim of such transactions would invariably be to benefit the AE. Otherwise if it is delay on normal functioning, which will be covered within the same F.Y. then the delayed period cannot be factored in the working capital adjustments.

(vi) Further, this issue of delayed receivables by the company, whether, gets factored in the working capital adjustment or not has been dealt in detail by the Hon'ble Delhi ITAT in the case of Bechtel India Pvt. Ltd. vs ACIT 4(2), 85 Taxmann.com 121 (Delhi Tribunal 2017) wherein the Hon'ble Tribunal has explained the issue of working capital adjustment on account of delayed receivables. Being very pertinent, the relevant extract of the Hon'ble Tribunal order is reproduced below:-

19. In the case of Ameriprise India (P.) Ltd. (supra), it has been observed that the working capital adjustment is in respect of

international transaction of rendering services to the AE. Interest for credit period allowed as per the agreement is given in the price charged for rendering of services. Whereas the non-realisation of invoice value beyond the stipulated period is a separate international transaction whose ALP is required to be determined. Granting of working capital adjustment is confined to the international transaction of rendering of services, whose ALP is separately determinable. On the other hand, the international transaction of interest receivable from its AEs for late realization of invoices beyond such stipulated period is a separate international transaction. Allowing working capital adjustment in the international transaction of rendering of services can have no impact on the determination of ALP of the international transaction of interest on receivables from AEs beyond the stipulated period allowed as per agreement. In the case of Mckinsey Knwledge Centre (P.) Ltd. (supra), again, the Tribunal reiterated this reasoning and, inter alia, observed that:

".....In our considered opinion, whereas, the international transaction of purchase/sale of goods from/to AE contemplates comparison of the price charged/paid for such goods by impliedly including the interest for the period allowed for realization of invoices as per the terms of the agreement, the international transaction of charging interest on late recovery of trade receivable covers the period which starts with the termination of the period of credit allowed under the agreement, which is subject matter of the international transaction of purchase/sale of goods."

20. The Tribunal also explained that if an invoice is raised during the year and the proceeds are realized within the year, but, beyond the stipulated period of agreement, then, the same will not come within the working capital adjustment because working capital adjustment is made with reference to the opening and closing balances as on 1st April and

31st March. Therefore, respectfully following the decision of the Tribunal noted above, we reject the assessee's contention that the interest on delayed payment of receivables get subsumed in the working capital adjustment allowed to the assessee. The Id. counsel has also advanced an argument that since it was debt free fund company, which finding is not disputed, therefore, no interest could be attributable on the late realization of receivables. In our opinion, this plea is to be rejected at the threshold because, as noted earlier, interest on delayed realization of receivables is a separate international transaction and, therefore, requires separate benchmarking. It has nothing to do with the operations of the assessee company being with the debt free funds only.

It is also submitted that in the above noted case of Bechtel India Pvt. Ltd, the Hon'ble Tribunal has arrived at the decision after analyzing the decision of the Hon'ble ITAT in the case of Kusum Healthcare Pvt. Ltd. Vs (ITA 6814/Del/2014), ITAT, Delhi and also the decisions of the Hon'ble ITAT in the case of Ameriprise India Pvt. Ltd. (2015) 62 Taxmann.com 237 (Delhi Tribunal) and Mckinsey Knowledge Centre Pvt. Ltd. vs. DCIT (2017) 77 taxmann.com 164 (Delhi Tribunal).

(vii) It is further submitted that the various Hon'ble Tribunals after relying on the various High Court decision, after the amendment to section 92B of the IT Act introduced by the Finance Act 2012, have held that the outstanding receivables from the AEs constitute a separate international transactions and on which interest is to be calculated separately and ALP adjustment are required to be made. Also the various Hon'ble ITATs have also distinguished the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. and have held that the outstanding receivable constitute a separate international transaction and the department /TPO can charge interest on receivables even if the working capital adjustment have been made in the case. Reference is invited to the following recent decisions in which this issue

has been examined including the impact of interest on outstanding receivables after working capital adjustment and the AOs stand of charging interest on outstanding receivables has been confirmed.

(a) Albany Molecular Research Hyderabad Research Center (P.) Ltd. vs. Deputy Commissioner of Income-tax [2021] 126 taxmann.com 289 (Hyderabad - Trib.)

The relevant extract of the Hon'ble Tribunal decision is reproduced below:-

5.5 For the A.Yrs. 2013-14 and 2014-15, there is no dispute that assessee had realized its receivable from its AEs after abnormal delay beyond the agreed credit period. This, in our considered opinion, tantamount to indirect funding made by the assessee to its AEs by allowing the AE to utilize funds of the assessee as per its whims and fancies. Merely because the assessee is a debt free company except ECB loan, it cannot allow its funds to be utilized by its AE for an indefinite period of time beyond the agreed credit period. We find that clause C of Explanation to section 92B of the Act has been introduced in the statute by the Finance Act 2012.

For the sake of convenience, clause C of relevant explanation is reproduced hereunder:-

"(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee,

purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;" The aforesaid clause C states "capital financing" to include "debt arising during the course of business".

Manifestly, in the instant case, the deferred receivables fall squarely within the ambit of debt arising during the course of business which is included in the category of expression

"capital financing" under clause C of Explanation of section 92B of the Act. Hence, we hold that the outstanding receivables from AE constitute a separate international transaction and on which interest is to be imputed thereon and consequently ALP adjustment to be made. Hence, the primary argument made by the Id. AR that the adjustment made on account of outstanding receivables cannot be construed as an international transactions is hereby rejected and dismissed.

5.6 We find that the Id. AR vehemently argued that the working capital adjustment has been granted by the Id. TPO to the assessee for both the years and hence, there cannot be further imputation of interest on outstanding receivables as the same gets subsumed in the working capital adjustment itself. In this regard the Id. AR placed reliance on the decision of Delhi High Court in the case of Pr. CIT v. Kusum Healthcare (P.) Ltd. [2018] 99 taxmann.com 431/[2017] 398 ITR 66/[2018] 300 CTR 343 and also the Co-ordinate bench decision in the case of ValueLabs v. ACIT [IT Appeal Nos. 1909 and 1910 (Hyd.) of 2017, dated 9-7-2020]. We find that there is absolutely no dispute that working capital adjustment had indeed been granted by Id. TPO to the assessee for A. Y.2013-14 and 2014-

15. Infact, there is also an exclusive discussion made by the Id. DRP in para 2.1.12 of its order regarding the same for A.Y. 2014-15. Hence, by applying the ratio of the Hon'ble Delhi High Court in the case of Kusum Healthcare referred to supra, no imputation of interest on outstanding receivables could be made thereon for both the years. However, in respect of invoices raised in earlier years, where the amounts were realized during the year under consideration but beyond the agreed credit period, imputation of interest by applying LIBOR + 200 basis

points is to be made from 1st day of April of the relevant years till the date of realization of debts. In respect of invoices raised during the respective years, where the amounts were realized during the respective years itself, but beyond the agreed credit period, imputation of interest by applying LIBOR +200 basis points is to be made from the date of expiry of agreed credit period from the date of raising the invoice and the same is to be charged till the date of realization of debts. We hold that the decision of the Hon ble Delhi High Court in Kusum Healthcare (P.) Ltd. (supra) talks about only outstanding receivables at the end of the year i.e. to say when working capital adjustment is given to the assessee, no separate adjustment need to be made on the outstanding receivables at the end of the year. In our considered opinion, the decision of Hon'ble Delhi High Court does not speak about the invoices that were realized from the AE beyond the agreed credit period during the year. Hence, it could be safely concluded that the decision of the Hon'ble Delhi High Court in Kusum Healthcare (P.) Ltd. (supra) does not give any finding with regard to invoices realized during the year from AE. To that extent alone, we are giving our independent finding by treating that as a separate international transaction and directing the Id. TPO to charge interest by applying LIBOR + 200 basis points in the aforesaid manner.

(b) Swiss Re Global Business Solutions India (P.) Ltd. v. Addl./Jt./Dy./ Assistant Commissioner of Income-tax/Income-tax Officer, (NFAC) Delhi [2022] 137 taxmann.com 417 (Bangalore - Trib.)

(c) Maxim Integrated Products India Sales Pvt. Ltd. v. DCIT (2022) 140 taxmann.com 578 (Bangalore-Trib.)

In both the above cases, the assessee have taken the ground that the interest on receivables is subsumed in the working capital adjustment and there is no requirement for separate adjustment. Further the assessee has also taken the ground that TPO/DRP allowed the working

capital adjustment on other transactions and that adjustment subsumes the interest on receivables and there is no requirement for separate additions on account of interest on outstanding receivables. Further in all these cases, besides other cases, the assessee has relied on the decision of Hon'ble Delhi High Court in the case of PCIT vs. Kusum Healthcare Pvt. Ltd. 398 ITR 66 (Delhi 2017. After considering the various grounds raised by the assesseee in those cases, the Hon'ble Respective ITATs has rejected the assessee's contentions and considered the interest on outstanding receivables as separate international transactions which is required to be benchmarked separately and assessee was found liable for separate adjustment on account of interest receivables. Also in all these cases the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare was duly considered and distinguished.

4. Reliance is also placed on the recent decision of the Hon'ble ITAT Hyderabad in the case of Apache Footwear India Pvt. Ltd. v. ACIT (2023) 148 taxmann.com 371 (Hyderabad-Trib.), wherein the Hon'ble Tribunal after considering the various decisions including the Hon'ble Delhi High Court decision in the case of Kusum Healthcare Pvt. Ltd. have come to conclusion that outstanding receivables by the assessee from AEs are required to be separately benchmarked and interest should be charged on the delayed period @ 6% on the receivables. Being very pertinent the relevant extract of the Hon'ble Tribunal order is reproduced below for ready reference:-

11. The above-said issue of delay in receivables is no more res integra. The co-ordinate Bench in the cases relied upon by the Revenue examined the issue and thereafter directed the TPO/Assessing Officer to apply rate of interest of 6% on outstanding receivable at the year end. The assessee had relied upon various judgements. All these judgments

have been considered by the coordinate Bench and thereafter, the above said direction was issued by the Bench.

12. The reliance of the assessee on the decision of Hon'ble Delhi High Court in the case of Boeing India (P.) Ltd. (supra), is of no use to the assessee as in the said judgment, the Hon'ble Delhi High Court in Para 15 had mentioned that the issue receivable is essentially a question of fact. As mentioned hereinabove, in the present case, there is a delay in receiving the outstanding of Rs.62,38,68,941/- in respect of 519 invoices as mentioned hereinabove and there is no explanation given by the assessee for such a delay in receiving the amount. The very purpose of benchmarking the transaction is to ascertain whether assessee, who is similarly situated, would render the same kind of services at the same or similar price to a third party or not. If we examine the issue in the above-said context, it would be clear that the assessee would charge bank interest or any other interest with a find any error in the same. view to compensate itself on account of delay in making the payment. Hence, we do not find any error in the same.

13. The reliance of the assessee in the case of Betchel India (P.) Ltd. (supra) is also not correct as A.Y. in that case was 2010-11. By the Finance Act, 2012, the Explanation was inserted in Sec.92B of the Act and by virtue of which "payment or deferred payment or receivable or any other debt arising during the course of business" has been considered to be an international transaction which is required to be benchmarked. Following the above said Explanation, the co-ordinate Bench for the subsequent assessment years vide order dt.16-5-2017 in the case of Bechtel India (P.) Ltd. vs. Asstt. CIT [2017] 85 taxmann.com 121 (Delhi - Trib.) had decided the issue against the assessee. In view of the above, the decision relied upon by the assessee is of no help to assessee.

14. So far as the argument of the assessee that the assessee is a debt free company and therefore, no borrowed fund was used for making supplies to it's A.E. and therefore, is not liable to be compensated for the delay in receiving the receivable is concerned, the same in our view, suffers from inherent flaw as in the T.P. analysis, the TPO is required to examine whether the assessee had supplied the product/services to it's A.E. at Arm's Length Price or not? If by providing the services/goods at a discounted rate or permitting the assessee to receive the payment after a long period of 60 days or 90 days, then it will amount to permitting the A.E. to use the working capital of the a ssessee for the purposes of earning the profit. No prudent business man would venture into this kind of activity and permit a third party to use the working capital of the assessee and earn profit thereon. In the present case, though the assessee was required to maintain the T.P. Study and file the same before the TPO to show that the assessee's transactions with it's A.E. were at Arm’s Length however, nothing has been brought to our notice that the assessee has brought any comparable instance. In these circumstances, the TPO had applied the banking rate as applicable to short term loans. In our view, the same is required to be corrected and instead thereof, ALP is to be computed by adding notional interest @ 6% on the receivable. Considering the totality of facts and circumstances, in view of the decisions cited supra and in view of foregoing discussion, we dismiss the appeal of the assessee. Accordingly, the appeal of the assessee is dismissed.

(viii) There are several other decisions by different Tribunals which have also taken the similar stand in favour of the department and for the sake of brevity, the same are not mentioned. Thus to summarize the following points are humbly submitted for the kind consideration of the Hon'ble Bench.

1. The issue of delay in receivables from AEs is no more res integra.

2. After the amendment in explanation to section 92B, the outstanding receivables constitute a separate international transaction which is required to be bench marked separately.

3. The working capital adjustment does not subsume the invoices which are raised during the year and accordingly interest is to be separately computed for outstanding receivables.

4. Whether the assessee is a debt free company or not is immaterial as TPO is required to examine whether the Indian entity/assessee had supplied the products/ services to its AEs at ALP or not. Further being debt free does not mean that it can allow its funds to be utilized by AE for indefinite period of time.

5. As explained in above noted paras, the decision of the Hon'ble Delhi High Court in the case of Kusum Healthcare has been distinguished by several Tribunals including Delhi Tribunal.

B. Inter company services agreement clearly provides for charging of interest on delay receivable after 60 days.

Further, a most important and distinguishing thing in the case of assessee, is the inter company Service Agreement, which the assessee company has entered into with its holding company/AE (placed at page 976 to 984 of PB)

Clause 2.3 i.e. Invoicing and Settlement of Costs of the agreement deals with the payment terms and being pertinent, the relevant extract of the same is reproduced below:

(B) Unless otherwise specified in Exhibit A, all payment under this Agreement shall be in United States dollars and shall be due within sixty (60) days of the date of invoice and may be made by check or wire transfer. Daily interest at the rate of prime rate plus two percent (2.0%)

per annum may accrue and be charged, until paid, on all payment not received by an invoicing party within such sixty (60) days period.

(C) In the event that a party disputes an invoice, the disputing party shall deliver a written statement describing the dispute to the invoicing party within sixty (60) days following receipt of the disputed invoice. The statement shall provide a sufficiently detailed description of the disputed items. Amount not so disputed shall be deemed accepted.

Thus, in the case of assessee, the agreement itself provides for charging of interest in case of delay in payments after more other 60 days. Further, the agreement itself says that interest @ prime rate + 2% per annum is to be charged on all payment which are received after 60 days and interest is to be charged is from the 61 day till the time the payment is made. Thus, from the perusal of the agreement clearly shows that the AE is liable to compensate the assessee company for all delayed payments and there is no exception granted on delayed payments. Thus, the AO/TPO/DRP has charged the interest and their action is clearly in line with the terms and conditions stipulated in the agreement. In fact, it is not even clear that why the assessee is contested such adjustment when there is a clear cut provision in the agreement itself for charging of interest on delayed receivables.

Further this condition, as stipulated in the case of asssessee in inter services agreement, is not there in the case of Kusum Healthcare Ltd and accordingly assessee can't claim that it is covered by Kusum Healthcare decision. Also from the perusal of the he earlier orders of the Hon'ble Tribunal, it is clearly seen that this agreement was not in place at that time and it has also not been referred to in the earlier orders. The intercompany services agreement has been entered into 13.10.2015 and accordingly it has come into place only from F.Y. 2015-16 (A.Y. 2016-17 which is the assessment year in question. Thus the assessee also cannot claim that the earlier orders of the tribunal are binding for

the current year also because the facts specially the inter company services agreement was not in place earlier, so the earlier tribunal orders are not binding precedent in the instant case.

C. Why the earlier orders of the Hon'ble Tribunal in the case of assessee are not applicable to the facts of the instant case

(i) In its defense, the assessee has relied on the order of Hon'ble ITAT in its own case for A.Y 14-15. From the perusal of the order of ITAT, it is seen that the Hon'ble ITAT has mainly decided the issue because of working capital adjustment has been allowed by the AO and the DRP has not disputed the same. It is a fact that working capital adjustment has been allowed to the assessee by TPO, in the instant case also, but, however equally true is the fact that DRP in its directions has rejected the assessee contentions that working capital adjustment subsumes the interest on delayed receivables, by relying on the judgment of Bechtel India limited following its decisions in Ameriprise India (P) Ltd and Mckinsey knowledge Centre (P) Ltd. (Para 3.7.2.3 page 20 to 21 or P order / pg 29 to 30 or Appeal set) Also DRP has discussed in detail, the fact that why decision of Hon'ble High Court is not applicable in the case of the assessee. Also, on identical facts, is the decision of Hon'ble. Hyderabad Tribunal in the case of Albany Molecular Research Center (P.) Ltd (para 5.6 cited above) and other cases cited above.

(ii) Further, the above noted decisions of various Hon'ble tribunals clearly discusses the issue raised by the assessee of working capital adjustment subsuming the interest on outstanding receivables and categorically gives a finding that working capital adjustment doesn't subsume the within year transactions of outstanding receivables i.e. invoices realized during the year after the completion of credit period from AE's. Also this finding is not from only from one tribunal but several tribunals have given similar findings and interpreted the decision of Hon'ble Delhi High Court in Kusam Healthcare. It is also brought to

the kind attention of the Hon'ble Bench i.e. the decision of various Hon'ble ITAT on the issues of interest on receivables are recent ones i.e. after the decision of Hon'ble ITAT in the case of the assessee for A.Y. 2015-16 Thus, it is humbly submitted that the ratio laid down in above noted decision with regard to working capital adjustment subsuming the interest or outstanding receivables realized during the years, may kindly be followed in the instant case also.

D. Further the assessee has also relied on the order of the Hon'ble Delhi ITAT in the case of Alcatel Lucent India Ltd. Vs. ACIT, Central Circe 15, Delhi in ITA No. 366/Del/2022 and ERM India Pvt. Ltd. vs. National e-assessment Centre, New Delhi (2021) 132 taxmann.com 220 (delhi), however the facts of the both the cases are different from the assessee case as there is no inter company services agreement with the respective AEs which provided for charging of interest on delayed receivables and assessee's case is on a totally different ground wherein the agreement itself clearly provides for charging of interest.

E .Also the asseesse has stated that the weighted average period of realization of invoies is 43.59 days, accordingly no adjustment is required. However, this reason is totally devoid of any merits because as stated above, the agreement clearly provides for charging of interest after 60 days and no such benefit of so called weighted average period is given in the agreement. Also the analysis has been made invoice wise and in line with the Hon'ble High Courts decision in the case of Kusum Healthcare, interest has been computed. Assessee has also taken one of the grounds that as no interest was charged from third party customers, accordingly no adjustment is to be made for related parties. In this connection, it is submitted that TP provisions clearly provides for determining ALP in the case of related parties and as these are anti tax avoidance provisions which hits at tax base of the country and accordingly are required to be strictly applied as held by several courts

including the Pune Tribunal in the case of M/s. AGS Customer Services India P. Ltd., ITA No.162/PUN/2022 & C.O. No.22/PUN/2022. Being pertinent the relevant extract of the Hon'ble Tribunals order is given below:-

5. We have given our thoughtful consideration to the forgoing rival pleadings and find forced in the Revenue's stand since an advance pricing agreement "APA" is applicable only for the specified time span not exceeding five consecutive previous years u/s.92CC(4) r.w. sub section (9A) of the Act. We make it clear that Chapter X in the Act is in the nature of a "SPECIAL PROVISION RELATING TO AVOIDANCE OF TAX" i.e. an anti avoidance measure introduced by the legislature. Hon'ble apex court's recent landmark decisions PCIT V/s Wipro Ltd. (2022) 140 taxmann.com 223, Commissioner V/s Dilip Kumar & Co. 2018 (9) SCC 1(SC) FB & CIT V/s. GM Knitting Industries (P) Ltd. (2015) 376 ITR 456 (SC) have settled the law that the relevant provisions in the Act ought to be put to stricter interpretation only.

It is also informed that during the course of hearing the assessee has mentioned that it is mostly deriving receipts from related parties only and the position taken in the hearing is contradicted to the grounds of appeal and hence not tenable.

F. Reliance is also placed on the decision of the Supreme Court of India in the case of Distributors (Baroda) Pvt. Ltd. vs. Union of India (1985) 22 taxman 49 (SC), wherein the Hon'ble Supreme Court has clearly held that if the earlier orders are based on mistaken presumption with regard to existence or continuance of a statutory provision then the same should not be followed as a precedent and the law should be settled correctly and permanently (para 19 of the Hon'ble Supreme Court decision.) On the facts of the assesse case in the instant year, the ratio of the Hon'ble Suprie Court decision is squarely applicable as the earlier orders of the ITAT, in the case of the assessee are not based on correct

appreciation of the facts and the law as laid down on the issue of interest on delayed receivables by various tribunals/courts.

G. Lastly, even at the cost of repetition, as discussed in detail in the above noted paras, it is once again reiterated that the interest on outstanding receivables has been duly computed by the TPO based on the principals laid down by the Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd, even though the decision of the Hon'ble Delhi High Court has been distinguished by several Tribunals. Also when there is a inter company service agreement which clearly mandates for charging of interest for all payments delayed after 60 days then there is absolutely no logic in not charging the interest on account of delayed receivables because it clearly tantamount to infringement of the written agreement between the asssessee and its AE and there is no reason at all to benefit the assessee even after the presence of the inter company service agreement. Accordingly the addition on account of interest on receivables may kindly be upheld and the assessee's appeal may kindly be dismissed on account of the issue of interest on outstanding/delayed receivables.

Issue no. 2 (revised ground of appeal no. 5) Addition on account of increase in capital amounting to Rs. 37,82,75,381/--

(a) The Assessee company has credited a sum of Rs. 37,82,75,381/- in its capital reserve account and when asked for explanation, the assessee company has stated that it has received this amount as lump-sum payment from its parent company M/s Synnex Group for discharging the obligation with regard to giving compensation to employees, which is part of salary to the employees of the company. The relevant extract of explanation given by the assessee company before the AO (page 23 of assessment order) is reproduced below:--

The assessee, Concentrix Daksh Service India Pvt. Ltd., is engaged in providing Customer Relationship Management service ("CRM") in India and worldwide. The shares of the Assessee were earlier held by IBM Corporation, USA (' IBM") up to January 2014. Subsequently, the CRM business of IBM was acquired by Synnex Group through its group company as part of worldwide acquisition of CRM business from IBM, As a result, the assessee, which was a part of said CRM business, also move under the control of Synnex Corporation ("Synnex") that became the resultant ultimate parent company of the Assessee. Prior too aforesaid transfer of CRM Business, IBM had laid down an employee award program wherein as part of IBM centennial year celebrations, certain stock options were to be granted to the employees of IBM, and its group entities including the assessee company. However, as a result of acquisition of the CRM business from IBM, it was consequently agreed that the Synnex/ parent Company shall be responsible entity for compensating the eligible employees of the award program through a cash settlement. Thus, such settlement In respect of the employees of the Assessee.

award program was an obligation required to be settled by Synnex/parent Company for al the

In view of the above arrangement and understanding between Parties, the Assessee during the given year FY 2015-16 made a lump sum payment of IN 37.82.75.381m to its employee as cash settlement in lieu of aforesaid employee award program which was treated as a part of employee salary. Furthermore, for the purpose, of computing taxable income for Ay 2016-17.

17. The Assessee has a part of INR 26,78,37,118 from the above payment of INR 37,82,76,381 as a prior period expense. Copy of Computation of income for AY 2016-17 is enclosed as Annexure 5 for your perusal.

Given that Synnex was under the obligation to settle such amount with the Assessee and around the fact that the Assess had already made the lumpsum cash payment to its employees Synnex through the group company, agreed to contribute the equivalent amount of cash of INR 37,82,75,381, to the Assessee.

Accordingly, in view of the above restricting arrangement in Assessee has during the year under consideration accrued the receivable of INR 37,82,75,381 from a group company under the head Capital Reserve account in its balance sheet. Since the consideration is a mere one - time settlement payment arising out of the obligation agreed by Synnex and does not have any commercial nexus with the business carried out by the Asssessee. It has thus been regarded as a capital receipt not liable to tax.

(b) From the above explanation, the following reasons emerge out for the stand taken by the assessee to show the lump-sum amount as capital receipt.

(1) The assessee company has treated the lump-sum amount as capital receipt because it did not have any commercial nexus with the business carried out by the assessee.

(2) The assesee company considered it as a wind fall payment which emanated out of the obligations of the parent company for acquiring the CRM business from IBM and assessee was part of the CRM business.

(3) The assessee has also stated that the manner/character of the receipt shown in the books of account is also a deciding factor in treating the receipt as capital or revenue.

(c) All the contentions of the assessee company have been duly rebutted by the AO in his order from page no. 25 to 27. Further the Hon’ble DRP also agreed with the AOs reasoning and rejected the

assessee's contention by a speaking order mentioned at para 3.10 at page 34-35 of its order. The assessee contentions, on this issue, are not acceptable because of the following reasons:-

(1) The assessee company has made the payment of Rs. 37,82,75,381/- (i.e. the same amount for which it had received reimbursement) to its employee in the form of salary and claimed the same as revenue expenditure. Thus, how can a person claim a particular payment as revenue expenditure and show the same amount, received as reimbursement, as capital receipt, which shows double standards by the assessee company.

(2) It is an undisputed fact that the payment to the employees was part of employee award program and treated (as evident from the assessee's reply filed before

AO) as a part of employee salary. The salary payment is definitely a revenue expenditure and by the same logic, any reimbursement received from the parent company is also a revenue receipt and by no stretch of imagination, the reimbursement for salary can be treated as capital receipt.

(3) The assessee's action of treating the two parts of the same transactions i.e. payment of salary to the employees as revenue expenditure and reimbursement of the same amount as capital receipt, is clear cut case of self contradiction because the two limbs of the same transaction which is of same nature, involves same amount etc. cannot be treated differently in the accounting principle.

(4) In the assessee's case, the amount which it has been reimbursed, exactly the same amount which it has paid to its employee and in fact, it is clearly mentioned in the reply of the assessee that it has received lump-sum amount and treated to be part of the salary of the employees only. Thus there is a clear cut nexus between the receipt and the

expenditure and it is a clear case of one to one mapping of the amount received from the parent company and the amount incurred for giving salary.

(5) The assessee has also submitted that the character of the receipts shown in the books of accounts also plays a vital role in determining the nature and consequent taxability of the receipt. This contention of the assessee is clearly incorrect and made without any basis as it has been laid down by several courts that the treatment of the entry in the books of accounts of the assessee is not the determining factor for its taxability. The purpose of the receipt is the determining factor i.e. whether it is received for capital purpose or revenue purpose which determines the taxability of the receipts. The assessee case is clearly a case of double exemption from taxation i.e. on one hand it is claiming the payment made to the employee as revenue expenditure but on the other hand it is treating the same amount (which has been paid to the employee) received as reimbursement without any profit element, as capital in nature. The stand of the assessee is clearly inconsistent and shows lack of uniformity in the treatment of same amount in the books of accounts.

(d) The Hon'ble Supreme Court in the case of Sahney Steel and Press Works Ltd. vs. CIT (1994) 94 taxmann.com 368 (SC) has clearly laid down a law /conditions i.e. when the receipt/subsidy is treated as capital or revenue receipt. The basic test to be applied in judging the character of a subsidy/grant is with respect to the purpose for which the subsidy/grant is given. Or in other words, the purpose test has to be applied and the other conditions like time of payment, the form of payment, treatment in the books of accounts etc are immaterial in determining the nature of the subsidy/grant. In this case, it is undisputed that parent company paid the exact amount (which the assessee has paid to its employee) for payment to employees as part of

salary, in line with the cash settlement/employment award program. The underlying feature, is clearly the purpose which is nothing but payment to employees as part of cash settlement of salary in respect of award program which is nothing but part of salary. In the case of the assessee, the purpose test is clearly established not only in respect of the reimbursement from the parent company but also from the fact that the same amount was given to the employees as part of salary. Thus it is proved beyond doubt, that assessee received the amount of Rs. 37,82,75,381/- as reimbursement for giving of extra salary to employees and also disbursed the same amount as salary only.

(e) Reliance is also placed on the order of the Hon'ble Mumbai ITAT in the case of GBTL Ltd. (2668/Mumbai/2018, A.Y. 2013-13). In this case, the assessee received a grant from its holding company for payment of salary to directors but did not show the entire remuneration in the P&L a/c as income. The Hon'ble Tribunal has clearly held that the amount received from the holding company cannot be allowed to be treated as exempt if the utilization out of it is allowed as deduction from the total income, chargeable to tax. The Hon'ble Tribunal has clearly held that the assessee cannot treat the grant, as its non taxable income but at the same time claim utilization out of it as deduction from total income. The operative part of the order of the Hon'ble Tribunal on this issue is reproduced below:-

19. We find that the aforesaid conduct is unsustainable. The contention of the assessee is that the said sum was received from holding company to enable it to pay directors remuneration beyond the limits prescribed by the Companies Act. Hence, the same is not an income but a capital grant. This argument is acceptable to the extent the expenditure out of the said is not treated as deduction from profits/ income. The assessee has done so and hence the amount received cannot be treated as non-taxable income as at the same time the expenditure out of it is claimed

as an expenditure/deduction. As referred above, the case laws referred by the learned counsel of the assessee are not at all applicable on the facts of the case. In those cases the amounts were received by the assessee company which were incurring heavy losses to recoup the losses and for the survival. In the present case, the situation is not at all like that. Moreover, in none of those cases the assessee had made such an effort to reduce the utilisation of grant in its computation of income. Further learned counsel of the assessee has claimed that neither the assessee company nor the holding company has shown the same amount as expenditure in profit and loss account. This is absolutely irrelevant claim made in the written submission by the learned counsel of the assessee. In the assessee company's computation of income the amount paid has been claimed as deduction. So it is admittedly claimed as a deduction. The claim that assessee has not debited in the profit and loss account is on the cup of a misleading statement. Another submission of the learned counsel of the assessee is that section 56(2) is not applicable to the current assessment year in this economy. Firstly we note that as discussed above, it is not the issue of taxability or the chargeable of the receipt in isolation. But the claim of deduction for utilization of the so called exempt grant which has to be considered alongwith. This is the actual subject matter of debate over here. Hence this claim of the learned counsel of the assessee that assessing officer has quoted wrong section is not at all sustainable. Moreover, it is settled law that quoting a wrong section is not fatal. Furthermore assessing officer has not specifically invoked section 56(2). The dubious method adopted by the assessee of claiming the utilization of grant as deduction from taxable income without offering the corresponding grant as income cannot be brushed aside on the claim that it is not debited to profit and loss account. As in substance the assessee is claiming the utilization of grant as deduction in the computation of income.

20. In this view of the matter in our considered opinion CIT(A) has completely erred in this regard. The amount received from the holding company cannot be allowed to be treated as exempt if the utilization out of it is allowed as deduction from the total income chargeable to tax. The assessee cannot treat the grant as its not taxable income and at the same time claim utilization out of it as a deduction from total income. Hence, we are of the considered opinion that the sum of Rs. 2.27 crores has been rightly brought to tax in as much as its utilization as remuneration has been claimed and allowed as deduction. The effect of this addition/disallowance is assessee's dubious act of not having claimed the expenditure/utilization of grant ostensibly though profit and loss account but claiming it though deduction in computation of income surreptitiously is nullified. Hence, we set aside the orders of learned CIT(A) and allow the Revenue's appeal on aforesaid reasoning.

The ratio of above noted case clearly applies in the case of the assessee and it is humbly requested that the entire amount received of Rs. 37,82,75,381/- as reimbursement from the holding company is nothing but revenue receipt of the assessee company and the assessee action of crediting the same in the Capital Reserve account is against the law as well as against the accounting principles.

Accordingly, the AOs action of taxing the same as revenue receipts may please be upheld.

Further during the course of the hearing, the assessee has not pressed and argued this issue and stated that they have already offered the above receipts as income in the computation. However, till the filing of the revised grounds of appeal, as late as 26.08.2023, the assessee was always raising this issue and because of that reason alone, the above brief argument is submitted for kind consideration of the Hon'ble Bench,

which may dismiss this ground of the assessee along with directions for treating the above receipts as income of the assessee.

Issue no. 3 (grounds of appeal no. 6, 6.1 & 6.2) Allowance of deduction of INR 26,78,37,118/- paid to the employee towards compensation for cancelled stock awards (part of aggregate payout of INR 37,82,75,381/-

This ground has been discussed in detail by the AO in second para of page 27 (page no. 71 of appeal set) of the assessment order. Further it is also mentioned that the AO has followed the directions of the Hon'ble DRP of verifying the additional claim of deduction and after verification, has taken the suitable action of disallowing the said expenditure. The facts of the case is that the assessee has itself disallowed the sum of 26,78,37,118/-as prior period expenditure pertaining to earlier years as these payments were made in F.Y. 2015-16. As per the terms of agreement with M/s Synnex Group, the assessee was entitled to receive reimbursement of cash payments as part of salary, which it has paid in earlier years also, thus the AO has rightly disallowed Rs. 26,78,37,118 as prior period expenditure based on the assesssee own treatment of the amount in question.

Issue no. 4 (Ground of appeal no. 4 & 4.1) Allocation of expenses between SEZ unit and taxable units

(a) During the course of assessment proceedings, the AO asked about the allocation of expenses between SEZ unit and taxable unit. The N.P/turnover ratio of SEZ business was 20% and for taxable unit was 9 % . The AO asked reasons for such deviation and not convinced from the details submitted, reallocated certain expenses between SEZ. (excempt) unit and taxable unit. (para 6.6 to 6.7 / Pg 18 to 19 to AO order. And based on that reallocation, recomputed deductions U/s 10A and made addition of Rs. 7,51,20,905/-

(b) The AO and DRP have discussed the contentions of the assessee at length. Further the issue is argued in detail before the Hon'ble bench. However for the assistance of the Hon'ble bench, the following brief submissions may also be taken on record.

(c) Repair & Maintenance (R&M); The asseessee is in its 10th Year of operation of SEZ unit and it has not claimed any expense on Repair and maintenance. This is simply not possible, because how can a manufacturing unit can run in its 10th year without incurring any expense on R&M. This looks beyond human probabilities and cannot be accepted. Reliance in this case is placed on the judgments of Hon'ble Supreme court in the cases of CIT v. Durga Prasad More & Sumati Dayal v. Commissioner of Income -tax, (1995) 80 Taxman 89 (SC).

(d) During the course of hearing the assessee has stated that it has signed lease agreement with a third party and because of that it is not debiting any separate repair and maintenance expenses. From the perusal of the lease agreement, it is seen that the said agreement, is mainly of the land and the building only with car parking spaces etc.

However, from the perusal of the schedule of fixed assets, it is seen that besides lease hold improvements, the assessee has lot of plant and machinery also and the net block of plant and machinery as on 31.03.2015 is 39,61,36,562/- Besides this the assessee has also huge tangible assets of computer, furniture and fixture and office equipment and it is difficult to believe that all these plant and machinery, furniture and fixture has no repair and maintenance cost in its tenth year. Also in the P&L a/c in schedule 27, the assesee has debited huge expenses with regard to repair and maintenance on building and plant and machinery. As no cost was allocated to SEZ units, the AO has made proportionate allocation to SEZ units and taxable units. The AOs action appears to be reasonable as the asssessee could not convince the AO with proper

evidences that the allocation between SEZ units and taxable units has been made in proper/scientific/actual manner.

Also with regard to certain other expenses like staff welfare, contribution to gratuity, recruitment expenses, sub contract charges etc. the AO has made proportionate allocation. As both the SEZ units and the taxable unit are performing almost the same function, then there is no reason for huge discrepancy in the net profit ratio of both this unit as well as the wide deviations in allocation of expenses under lot of sub heads. The asssesee also could not explain such vide deviation and it appears that the main reasons for allocation of more expenses to taxable unit as compared to non taxable units was to claim higher 10A deductions. The various courts/tribunal have held that the AO can re allocate the expenses between the taxable and exempted units if there is no proper/ scientific basis of allocations of expenses between such units. The reliance is also placed on the following decisions of Hon'ble jurisdictional Delhi high court and other Tribunals wherein the reallocation of expenses has been upheld by the following courts in which even the assessee has taken the ground that the reallocation of expenses cannot be made because there is audit of the books of the exempt units, however the following courts/tribunal has upheld such reallocation. The case laws cited are.

1) Controls & Switchgear Co. Ltd. v. Deputy Commissioner of Income-tax, HIGH COURT OF DELHI (2011) 16 taxmann.com 375 (Delhi). (para 13 & 14)

2) Khinvasara Investment (P.) Ltd. v. Joint Commissioner of Income - tax SR-5, Pune (2018) 110 ITD 198 (Pune) ITAT PUNE BENCH 'A' (para 4.1 to 4.3)

3) Telecommunications Consultants India Ltd. v. Additional Commissioner of Income-tax, Range 16, New Delhi ITAT DELHI BENCH 'E' (2012) 20 taxmann.com 31 (Delhi). (para 13 to 16)"

6. The arguments of the ld. DR have been provided to the ld. AR who inturn submitted his rebuttal in writing is reproduced below:

1. **"Transfer Pricing- Proposed Addition of INR 7.66.20,461 (Ground No. 2 to 2.3)**

1.1. At the outset, it is submitted that late realization of sale proceeds gets subsumed under the working capital adjustment and accordingly, no further separate adjustment is **warranted in respect of overdue receivables, as also upheld by the** Hon'ble Delhi High Court in the case of Kusum Health Care Pvt. Ltd. (ITA 765/2016) **and by** Hon'ble Delhi Tribunal in Assessee's own case for AY 2015-16 (ITA No. 4453/Del/2019).

1.2. It is Ld. DR's contention that the AO/TPO order on Interest on delayed receivables fulfils all the conditions laid down by the Hon'ble High Court decision in the case of PCIT vs. Kusum Healthcare Pvt. Ltd. 398 ITR 66 (Delhi 2017) and accordingly the case is covered in favour of the Department.

1.3. It is humbly submitted that the DR has misconstrued the said decision and has failed to appreciate the principle laid down by the jurisdictional High Court. At the cost of repetition and for the sake of ready reference the relevant observations are reproduced below:

"10. The Court is unable to agree with the above submissions. The inclusion in the Explanation to Section 92B of the Act of the expression "receivables" does not mean that de hors the context every item of ''receivables'' appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterized as an international transaction. There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the Assessee will have to be studied. In other words, there has to be a proper inquiry by the TPO by analyzing the statistics over a period of time to discern a pattern which would indicate that vis-a-vis the receivables for the supplies made to an AE, the arrangement reflects an international transaction intended to benefit the AE in some way.

11.The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterized the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi). "

1.4. In view of the aforesaid the jurisdictional high court has laid down to broad principles on the issue of interest on outstanding receivables -

1.4.1. *The inclusion in the Explanation to Section 92B of the Act of the expression "receivables" does not mean that every receivable would automatically be characterised as an international transaction. The TPO has to enquire and analyse the statistics over a period of time to discern a pattern to come to a conclusion that arrangement reflects an international transaction. The High Court further held that merely*

stating that receivables have been outstanding beyond 180 days cannot in itself satisfy the aforesaid condition.

1.4.2. *Further, even if it is established that such outstanding receivables indeed amount to an international transaction, even than no additions can be made where assessee has already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables as any addition on that account would distort the picture.*

1.5. In the present case, the primary contention of the Appellant is that the TPO while benchmarking the ITeS segment has granted working capital adjustment to the Appellant and thus the Appellant's profitability was benchmarked against working capital adjusted margins of the Comparable. Thus, in term of the decision of jurisdictional high Court in case of Kusum Healthcare (supra) no adjustment is warranted even if it is held that the outstanding receivable is an international transaction.

1.6. The entire focus of the DR in Page 3 to 6 is to somehow establish that the outstanding receivable is an international transaction which in terms of the decision in Kusum Healthcare is irrelevant where working capital adjustment has been granted. This finding of the Hon'ble Delhi High Court has been followed by the coordinate bench of this Tribunal in catena of case and same are being relied upon.

1.7. Without prejudice to the above, it is also submitted that the DR is seeking to improve the case of the TPO as the TPO never enquired into the facts of the case to establish a pattern as is being painted by the DR. However, as such determination is irrelevant to the issue at hand same is not being explained for the sake of brevity.

1.8. The DR has also sought to argue that the delay during the year cannot be factored into the working capital adjustment and thus it cannot be said

that the Appellant has factored in this impact while comparing working capital margins of the comparable. This is again an attempt to improve case of the TPO which is impermissible in law as same was not even alleged by the TPO. in this regard reliance is placed on the decision of the Hon'ble Supreme Court of India in Mohinder Singh Gill v. Chief Election Commr. [1978] 1 SCC 405 wherein it has been held as under-

> *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. Orders are not like old wine becoming better as they grow older."*

1.9. Without prejudice to the above, it is also submitted that the contention regarding delay during the year also does not come to the rescue of the Department has same malady also plagues the profit margins of the Comparable. In case any addition is made in case of the Assessee on this count than it will require a corresponding adjustment to the profit margins of the comparable in terms of Rule 10B(2) & (3) of the Income-tax Rules, 1962 which is impossible as only opening and closing balance of the comparable companies are available in the public domain. It is based on these principles and harmonic reading of the Income-tax Act, 1961 & Income-tax Rules, 1962 that the jurisdictional High Court held that in case where working capital adjusted margins are compared then adjustment on account of outstanding receivable is not warranted.

1.10. Thereafter the DR in the submission (Pg. 5 & 6, Paragraph (vi) & (vii) has referred to the following decisions of the Tribunal where adjustment in respect of notional interest on receivables has been upheld by the Tribunal:

- Bechtel India Pvt. Ltd. vs AC1T 4(2), 85 Taxmann.com 121

(Delhi Tribunal 2017)

- Ameriprise India Pvt. Ltd. (2015) 62 Taxmann.com 237 (Delhi Tribunal)
- Mckinsey Knowledge Centre Pvt. Ltd. vs DC1T (2017) 77 taxmann.com 164 (Delhi Tribunal)

1.11. Recently a coordinate bench of this Tribunal in the case of **Orange Business Services India Solutions (P.) Ltd. v. DCIT ([2022] 141 taxmann.com 167 (Delhi - Trib.))** and **Global Logic India Ltd [TS-810-ITAT-2022(DEL)-TP],** upheld the deletion of adjustment on account of interest on outstanding receivables by placing reliance on the Hon'ble Delhi High Court ruling in the case of Kusum Health Care Pvt. Ltd. after referring to all the aforesaid arguments preferred by the Revenue. The relevant extract the case of Orange Business Services India Solutions (P.) Ltd (supra) is reproduced for ready reference -

"10. The Id. DRP held that the assessee's reliance on the Delhi High Court's decision in Kusum Health Care (P.)Ltd. (supra) is quite misplaced as in that case an important aspect of the matter was not brought to the notice of their lordships of the High Court that this new explanation to section 92B was specifically inserted to reiterate the fact that the items enumerated in the explanation will ipso facto partake the character of an international transaction and will be subjected to transfer pricing provisions irrespective of whether they have any bearing on profit/loss of the relevant year or their impact on profit/loss account is determinable under normal computation procedures other than the transfer pricing regulations. The Id. DRP quoted legislative intent which has been elucidated in the Explanatory Memorandum to the Finance Bill 2012.

11. This issue has been adjudicated by the Tribunal examining the decisions in the case of Kits urn Healthcare, Mckinsey Knowledge, Ameriprise India (P.) Ltd. The details are as under.

12. The Delhi Tribunal in case of Kusum Healthcare (P.) Ltd. *v.* Asstt. CIT [2015] 62 taxmann.com 79 held that the working capital adjustment takes into account impact of outstanding receivables and no further adjustment required if the margin of the assesses is higher than working capital adjusted margin of comparable.

13.The Hon'ble Delhi Tribunal in case of Ameriprise India (P.) Ltd. (supra) considered the decision of coordinate bench in the case of Kusum Healthcare and held that the allowing working capital adjustment in the international transaction of rendering services can have no impact on the determination oj ALP of the international transaction of interest on receivables from AEs.

14. The Delhi Tribunal in the case of McKinsey Knowledge Centre (P.) Ltd. (supra) followed their finding in the case of Ameriprise India (supra).

15.In the meanwhile, the Hon'ble Delhi High Court, vide order dated 25-4- 2017 in the case of Kusum Healthcare(supra), dismissed the appeal of the revenue against the decision of Hon'ble Tribunal and that (i) The inclusion in the Explanation to section 92B of the Act of the expression "receivables" does not mean that de hors the context every item of "receivables" appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterized as an international transaction and (ii) With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/projitability vis-a-vis that of its comparables, any further adjustment only on the basis oj the outstanding receivables would have distorted the picture and re-characterized the transaction.

16.In the appeal filed by the assessee in the case of Mckinsey

Knowledge, the Hon'ble High Court vide order dated 7-2-2018, while admitting the appeal on the other issue, remitted the issue of interest charged on outstanding receivables to IT AT, following their decision in the case of Kusum Healthcare.

17.However, vide order dated 9-8-2018, the Hon'ble High Court in the case of Mckinsey Knowledge, while deciding the appeal of the assessee on other issue, also rejerred to the decision of the Hon'ble Delhi Tribunal in case of Ameriprise India (P.) Ltd. (supra) on issue of interest charged on outstanding receivable and concluded that the assessee's contention that the ITAT erred in concluding that charging of interest on delayed receipt, of receivables is a separate international transaction which requires to be benchmarked independently, is incorrect."

18.Aggrieved, the taxpayer (Mckinsey Knowledge) jiled Review Petition before the Hon'ble High Court against the order dated 9-8-2018 and the Hon'ble High Court, vide order dated 16-4-2019 in Review Pet. No. 360/2018, was pleased to recall/correct their order dated 9-8-2018, holding as under:

"9. As far as the first argument by the review petitioner, i.e., the answer to the question of bringing to tax the interest amounts goes, this Court is of the opinion that the J'act that the order of 7-2-2018 referred to Kusum Health Care had expressly remitted the matter for consideration to the ITAT supports the assessee's submission. All that the court had stated on 7-2-2018 was that the matter required re-examination by the ITAT in the light of the Kusum Health Care (supra). For these reasons, the judgment to the extent it deals with adjustments made by the TPO, and regarding interest on delayed receipt oj receivables, is a clear error. The court also furthermore notes the submissions made with respect to inapplicability to Explanation of Section 92B and its prospective operation. As the

order of 7-2-2018 reserved by contentions, this Court does not propose to disturb the effect of that matter. The matter will be considered by the ITA T on its own merits. "

19. In view of the aforesaid sequence of events, it would be noted that the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare is still the binding precedent on the issue of interest on outstanding receivables. Needless to mention that the law laid down by the Hon'ble High Court in the case of Kusum Healthcare was followed by the ITA T in case of Global Logic India Ltd. *v.* Dy. CIT [2019] 102 taxmann.com 115 (Delhi - Trib.),Global Logic India Ltd. *v.* ACIT [2020] 117 taxmann.com 640/185 ITD 795 (Delhi - Trib.) and Global Logic India (P.) Ltd. *v.* Dy. CIT [2022] 134 taxmann.com 35 (Delhi - Trib.). Hence, keeping in view, the established position, we hereby deleted the addition made by the Assessing Officer.*"*

1.12. In view of the above, the Hon'ble Tribunal would appreciate that the decision of Hon'ble Delhi High Court in the case of Kusum Health Care Pvt. Ltd. is still the binding precedent on the issue of outstanding receivables.

1.13. With regards to the DR's contention that the Appellant being a debt free company is not relevant, it is humbly submitted that same is in teeth of the observations made by the Hon'ble jurisdictional high court in the case of **Bechtel India [ITA 379/2016) wherein it has been held as under -**

"4. As far as question (B) concerning the adjustment for interest no receivables, the Court finds that the ITAT has returned a detailed finding of fact that the ***Assessee is a debt free company and the question of receiving any interest on***

receivables did not arise. Consequently, no substantial question of law arises for consideration as far as this issue is concerned".

1.14. The relevant extract of the **ITAT order (ITA No 1478/Del/2015)** is reproduced hereunder:

> "15.1. It is ***brought to our notice that the Assessee is a debt free company. In such circumstances it is not justifiable to presume that, borrowed funds have been utilized to pass on the facility to its AE's.*** The revenue has also not brought on record that the Assessee has been found paying interest to its creditors or suppliers on delayed payments.
>
> ***16. In lieu of the discussions and the ratio laid down in the case of Kusum Healthcare Pvt. Ltd., we direct that no separate adjustment for interest on receivables are warranted in the hands of the Assessee"***

1.15. Further, the above decision of the Hon'ble ITAT in Bechtel India has reached finality as the SLP filed by the revenue against the decision of the Hon'ble High Court was dismissed by the Hon'ble Supreme Court [TS-591 - SC-2017-TP],

1.16. In view of the above it is humbly submitted that the Appellant is a debt free company as evident from its financial statements for FY 2015-16. Since it does not carry any interest cost on its funds, therefore it is not necessarily required to charge an interest on delayed receipts.

1.17. The DR at page 10 of the submission has also contended that the intercompany agreement of the Assessee provides for charging interest @ prime rate + 2% p.a. in case of delay in payments beyond 60 days and thus, AE is liable to compensate the Assessee for all delayed payments in line with the terms and conditions stipulated in the agreement.

1.18. It is clarified that the allegation of the DR that the AE is liable to compensate the Assessee for all delayed payments and there is no exception granted on delayed payments is vague and incorrect as the intercompany agreement mentions that the Assessee **'may'** accrue and charge interest and does not use the wording **'shall'.** Thus, the intercompany agreement does not make the Assessee liable to charge interest on delayed payments from AE. See below extracts of the intercompany agreement:

> "2.3 *Invoicing and Settlement of Costs*
>
> (B) Unless otherwise specified in Exhibit A, all payments under this Agreement shall be in United States dollars and shall be due within sixty (60) days of the date of invoice and may be made by check or wire transfer. Daily interest at the rate of Prime rate plus two percent (2%) per annum ***may accrue and be charged***. until paid, on all payments not received by an invoicing party within such sixty (60) day period. "

1.19. Thus, from the above extracts, the Hon'ble Tribunal would appreciate that the intercompany agreement does not mandate levy of interest on delayed payments from AE.

1.20. The DR at Pg. 11 of the submission has contended that the earlier order of the Tribunal is not binding in the instant case because the facts of AY 2016-17 are notlike last year. DR specially relied on the aforesaid intercompany agreement to show that was applicable for AY 2016-17 only and not for earlier year.

16. It is submitted that there is no change in the facts in AY 2016-17 viz. a viz AY 2015-16. The intercompany agreement relevant for AY 2015-16 also provided for the same interest clause. See below extracts:

> "*2.4* **Invoicing and Settlement of Costs**

(B) Unless otherwise specified in Exhibit A, all payments under this Agreement shall be in United States dollars and shall be due within sixty (60) days of the date of invoice and may be made by check or wire transfer. Daily interest at the rate of the "Applicable index" - USD prime, LIBOR, or other similar index appropriate for the applicable currency or geography - plus two percent (2%) per year, ***may accrue and be charged,*** *until paid, on all payments not received by the invoicing party within such sixty (60) day period. "*

1.21. In view of the above, it can be seen that there is no change in the facts in AY 2016-17 viz. a viz AY 2015-16, as alleged by the DR. Accordingly, it can be construed that the order passed by the Tribunal for AY 2015-16 for deleting adjustment in respect of notional interest receivables was passed after duly evaluating the terms and conditions of the agreement. Accordingly, no adjustment should be made for notional interest on overdue receivables for AY 2016-17 in light of the earlier order passed by the Tribunal for AY 2015-16.

2. Addition on account of increase in capital- INR 37,82,75,381 & Allowance of deduction of 1NR 26,78,37,118/-

2.1 In this regard it is humbly submitted that the amount of INR 37,82,75,381 was received by the Appellant as one-time voluntary contribution by Synnex and not as a consideration for provision of any services or in any other manner in the ordinary course of business. The contribution was made to protect the capital investment made by the Synnex in the Appellant. Hence, the said contribution qualifies as a capital receipt and cannot be brought to tax in the hands of the Appellant. Such treatment is also in line with the accounting treatment followed towards such receipts which were accounted for as a capital contribution by Synnex to the Appellant. Mere change in the settlement mechanism between the Buyer (Synnex) and IBM (Seller) and subsequent contribution by Synnex of an

equivalent amount to the Appellant would not impact the taxation of the Appellant.

2.2 Without prejudice to the above submission, during the course of hearing it was submitted that addition on this count should be restricted to the amount of corresponding salary expenditure (of 1NR 1 1,04,38,263) allowed as a deduction for the current year. The balance amount of 1NR 26,78,37,118 cannot be taxed since deduction for expenditure **of** equivalent amount has been disallowed as prior period expenditure in the computation of income. (Please see computation of income @ Pg. 70 of Paperbook).

2.3 With regard to the amount of INR 26,78,37,118, it is submitted that the Assessee inadvertently disallowed INR 26,78,37,118 (recorded as prior period expenditure), while filing the return of income, and thus, deduction of aforesaid amount was not claimed in the return.

2.4. The liability to incur the expenditure arose when the unvestedstock awards granted to the employees (who were employed with the Assesseee till December 1, 2015) under the Centennial Award programme were cancelled and the cash settlement account was paid to the employees and accounted for by the Assessee.

2.5. Therefore, the liability crystallized during the subject year. Since the liability was determined (as the amount was payable to the employees who continued till December 2015) and crystallized in the subject year (when the stock awards were cancelled and cash-settled compensation became due), such an amount needs to be allowed as a deduction for the subject year. Accordingly, expenditure of INR 26,78,37,118, reported as prior period expenditure in the books of account based on accounting principles, is allowable in the current year.

2.6. Without prejudice to the above, it is to be noted that payment made by

the Assessee to its employees in lieu of the unvested stock awards granted under the Centennial Award programme is governed by the provisions of section 43B of the Act, which provides for deduction of bonus on payment basis.

2.7. However, where the contention of the learned AO is accepted that the amount received has a direct nexus with the expenditure incurred by the Appellant, then there has to be uniformity in accounting for the 2 transactions, the addition for the year should be restricted to 1NR 11,04,38,263.

3. Allocation of expenses between SEZ and taxable units- INR 5,62,64,530 (the addition made in the final assessment amounting to INR was reduced from 7,51,20,905 to INR 5,62,64,530 post rectification order dated August 23, 2021)

3.1 At the outset, it is wrongly mentioned that the Assessee is a manufacturing unit. The Assessee is a BPO which is engaged in the business of IT Enabled Services (ITES) i.e., in the nature of customer relationship management.

3.2 The actual direct expenses incurred by the Assessee were recorded on an actual basis, and further indirect/ common expenses were apportioned on the basis of turnover of the units. Details of the direct and indirect expenses under the relevant expense heads (which have been considered for disallowed by the learned AO) are given below:

3.3 Assessee had maintained separate books of accounts in respect of its SEZ and taxable units, which were audited by its auditor and the certificate issued under section 56F furnished before AO.

Description	Total	SEZ unit	Taxable
Direct Expenses (Specifically Identified):			
a. Repair and Maintenance (Building)	38,92,65,053	-	38,92,65,053
b. Repair and Maintenance (Plant)	4,80,69,893	-	4,80,69,893
c. Staff Welfare expenses	5,08,14,690	36,06,655	4,72,08,035
d. Contribution to Gratuity	10,62,22,763	1,05,71,295	9,56,51,468
e. Recruitment expenses	14,12,32,148	1,17,30,593	12,95,01,555
f. Sub-Contractor charges	50,10,02,990	17,520	50,09,85,740
Indirect/ common Expenses (allocated by the Appellant basis turnover):			
a. Staff Welfare expenses	6,80,44,990	5,54,37,004	1,26,07,986
b. Contribution to Gratuity	64,98,896	52,94,722	12,04,174
c. Recruitment expenses	4,49,39,505	3,66,12,711	83,26,794
d. Sub-Contractor charges	38,95,56,401	31,73,75,900	7,21,80,501

3.4 The reallocation of expense between the SEZ and taxable units is in gross violation of the law. It is a trite law that the accounts regularly maintained in the course of business are to be taken as correct, unless there are strong and sufficient reasons to indicate that they are unreliable.

3.5 Reliance in this regard is placed, amongst others, on the Supreme Court decision in the case of CIT vs. Woodward Governor India (P) Ltd (2009J 312 ITR 254. Therefore, there cannot be any case for the learned AO to re-allocate direct expenses which are specifically related to and incurred in relation to the identified units and are confirmed/ certified by the statutory auditor.

3.6 The indirect expenses/ common costs have been consistently allocated on turnover basis, which has been duly accepted by the revenue authorities in previous years. Reliance placed on the **Hon'ble jurisdictional High Court judgment in the case of CIT vs. EHPT India (P.) Ltd. [350 ITR 41],** wherein it was held by the Hon'ble jurisdictional High Court that distortion of profits may arise if the consistently adopted and accepted method of apportionment is sought to be disturbed in a few years."

7. Heard the arguments of both the parties and perused the material available on record.

8. We have examined the provisions of the Act and judgments on this issue.

9. As per explanation (i)(c) of Section 92B of the Income Tax Act as amended by Finance Act, 2012 w.r.e.f. 01.04.2002, the interest receivables is an international transaction. Section 92B(i)(c) reads "*capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business.*"

10. In the instant case, the revenue has clearly shown a pattern by analyzing the statistics over a period of time which is spread over more than one year and based on that the AO came to conclusion that there exists an arrangement.

11. In CIT Vs. EKL Appliances (209 Taxmann 200), it was held that the delay in receipt of the amounts has to be investigated on case to case basis and examination has to be conducted by the TPO/AO by analyzing the statistics over a period of time and to find out a pattern intended to benefit its AE. In Kusum Healthcare Pvt. Ltd. (ITA 6814/Del/2014), the Hon'ble Court held that the entire focus of the AO was on one Assessment Year and hence the pattern to justify undue benefit accorded could not be discerned.

12. In the case of Bechtel India Pvt. Ltd. Vs. ACIT (85 Taxman 121), after analyzing the case of Ameriprise India Pvt. Ltd (62 Taxman 237) and Mckinsey Knowledge Centre Pvt. Ltd. (77 Taxman 164) held that the interest on delayed payment of receivables cannot be subsumed in the

working capital adjustment allowed to the assessee. In the case of Albany Molecular Research Hyderabad Research Center (P.) Ltd. vs. DCIT (126 taxmann.com 289), the Co-ordinate Bench of Hyderabad Tribunal held that interest on outstanding receivables is a separate international transaction and directed to charge interest by applying LIBOR + 200 Points. In the case of Apache Footwear India Pvt. Ltd. vs. ACIT (148 taxmann.com 371), the Co-ordinate Bench of Tribunal concluded that interest on outstanding receivables from the AE is required to be separately benchmarked and interest should be charged on the delayed period @ 6% on the receivables.

13. We also make it clear that interest cannot be charged on each and every receivable and has to be examined on case to case basis and the TPO has to enquire and analyze the statistics over a period of time to discern a pattern to come to a conclusion that the arrangement reflects an international transaction. The AO has to examine the transactions of similar in nature with non-AEs to come to a conclusion to charge interest and also to determine the basis of interest to be charged.

14. We have also examined the order in the case of Orange Business Services India Solutions (P.) Ltd. v. DCIT (141 taxman 167) and Global Logic India Ltd [TS-810-ITAT-2022(DEL)-TP] and also the order of the Tribunal for the earlier years. Each year has to be looked into separately based on the facts of the each case. In this case, the inter company services agreement provides for charging of interest on delay of receivables after 60 days. The argument that the chargeability "may accrue" and doesn't necessarily binding on the assessee to charge the interest cannot be accepted. The very purpose of transfer pricing mechanism and determination of arm's length price is to examine whether the related party is given undue benefit at the cost of the profits and the

consequent taxes to be paid in India. The extract of the agreement is as under:

> "2.3 *Invoicing and Settlement of Costs*
>
> (B) Unless otherwise specified in Exhibit A, all payments under this Agreement shall be in United States dollars and shall be due within sixty (60) days of the date of invoice and may be made by check or wire transfer. Daily interest at the rate of Prime rate plus two percent (2%) per annum ***may accrue and be charged***. until paid, on all payments not received by an invoicing party within such sixty (60) day period."

15. Hence, we direct that the adjustment on account of receivables be computed after following the directions of the ld. DRP. The AO has considered each and every transaction and arrived at right conclusion to determine the adjustment. While computing so, it is directed that the AO shall set off the receivables cleared by the AEs in less than 30 days or received in advance as ordered by the ld. DRP. These directions are applicable to the year in question as the chargeability on interest receivables varies from year to year. The LIBOR is an internationally recognized rate which is appropriate to benchmark and to determine ALP on receivables. The mark-up decided by the ld. DRP is held to be reasonable. In the result, the appeal of the assessee on this ground is partly allowed.

Ground No. 3

Capitalization – wireless ports:

16. This ground relates to the disallowance of Rs.1,43,164/- by capitalizing the cost incurred towards purchase of indoor

wireless ports and allowing depreciation at the rate of 15%. It is submitted that the cost incurred for purchase of indoor wireless ports is for replacement of parts and not in the nature of acquisition of new plant and machinery. The AO has in this regard, has, recorded a categorical finding that these indoor wireless ports are not spare parts replaced but they have been purchased a fresh as a part of or as an acquisition of plant and machinery. The indoor wireless ports are in the nature of computer peripherals and hence, deprecation @60% is allowable. The appeal of the assessee on this ground is allowed.

Ground No. 4

Allocation-expenses –SEZ/non SEZ units:

17. The assessee has claimed deduction under section 10AA amounting to Rs.31,58,44,806/- being 50% of taxable profits of Bangalore unit. It was submitted that the actual direct expenses incurred by the assessee are recorded on actual basis, and further indirect/ common expenses are apportioned on the basis of turnover of the units. During the course of assessment proceedings, the assessee submitted a bifurcation of income and expenses between SEZ and taxable units along with schedule of fixed assets and depreciation for both SEZ and taxable units and employee details for both SEZ and taxable units.

18. The AO queried the assessee to justify the difference in the net profit to turnover ratio of the SEZ unit (i.e. 20%) and taxable units (i.e. 9%) both being in the same business. The assessee submitted that the variation in the net profit ratio

between the units is on account of extra ordinary adjustments during the year and other commercial/ business parameters, specifically having impact on the respective units in given circumstances which as are as follows:

a. One-time extraordinary adjustments of statutory bonus of Rs.32,46,28,564 and employee award compensation of Rs. 37,82,75,381

b. Differences in commercial and business parameters prevalent in the respective units

19. The AO reallocated the expenses between SEZ and taxable units in the following manner:

a. Repair and maintenance expense have been proposed to be allocated in the ratio of the block of assets of the respective units.

b. Staff welfare and contribution to gratuity expenses have been proposed to be allocated in the ratio of employees working in SEZ and taxable unit (0.19:1).

c. Recruitment and sub-contract expenses have been proposed to be allocated in the ratio of the turnover of SEZ and taxable unit (0.22:1).

20. In this manner, the AO proposed the following disallowance:

Description	Non-SEZ	SEZ	Total
Direct Expenses (Specifically Identified):			
a. Repair and Maintenance (Building)	38,92,65,053	-	38,92,65,053
b. Repair and Maintenance (Plant)	4,80,69,893	-	4,80,69,893
c. Staff Welfare expenses	5,08,14,690	36,06,655	4,72,08,,035
d. Contribution of Gratuity	10,62,22,763	1,05,71,295	9,56,51,468
e. Recruitment expenses	14,12,32,148	1,17,30,593	12,95,01,555
f. Sub-contractor charges	50,10,02,990	17,520	50,09,85,740
Indirect/common Expenses (allocated by the Assessee basis turnover):			
a. Staff Welfare expenses	6,80,44,990	5,54,37,004	1,26,07986
b. Contribution to Gratuity	64,98,896	52,94,722	12,04,174
c. Recruitment expenses	4,49,39,505	3,66,12,711	83,26,794
d. Sub-Contractor charges	38,95,56,401	31,73,75,900	7,21,80,501

21. Before the DRP, the assessee has furnished the statement of computation of income, profit and loss account of the SEZ unit to substantiate that the expenses (both direct as well as direct) have been correctly accounted in the SEZ unit. It is further submitted that the AO has not pointed out any discrepancy in the aforesaid documentary evidence and thus, according to the assessee, the aforesaid reallocation of expense between the SEZ and taxable units is in gross violation of the law. It is a trite law that the accounts regularly maintained in the course of business are to be taken as correct, unless there are strong and sufficient reasons to indicate that they are unreliable. Reliance in this regard was placed, amongst others, on the Supreme Court decision in the case of CIT vs. Woodward

Governor India (P) Ltd [2009] 312 ITR 254. Therefore, there cannot be any case for the AO to re-allocate direct expenses which are specifically related to and incurred in relation to the identified units and are confirmed/ certified by the statutory auditor.

22. Relying on the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Ehpt India Put Ltd, where the Hon'ble court referred to a judgment of the Hon'ble Supreme Court in the case of CIT Vs. Bilahari Investment Pvt. Ltd. and in view of the clear finding of distortion of the profits, the DRP held that the AO proceeded to reallocate the expenses.

23. Heard the arguments both the parties, who reiterated the submissions made earlier.

24. The assessee had maintained separate books of accounts in respect of its SEZ and taxable units, which were audited by its auditor and the certificate furnished before the AO. The assessee had also furnished the statement of computation of income, profit and loss account of the SEZ unit to the AO to substantiate that the expenses (both direct as well as direct) have been correctly accounted in the SEZ unit. The AO has not pointed out any discrepancy in the aforesaid documentary evidences furnished by the Appellant.

25. It is a settled position of law that the actual expenditure which directly pertains to a particular unit cannot be allocated to other unit.

26. The AO has also allocated the Repair and Maintenance expense to the SEZ unit ignoring the fact that as per clause 3.10 of the lease agreement of the SEZ unit all repair are to be carried out by Lessor. Thus, the allocation of such expenses is fundamentally flawed.

27. Further the staff welfare expenses, contribution to gratuity and recruitment expenses being directly identifiable cannot be apportioned on the basis of number of employees. With respect to indirect/ common costs as well, the turnover basis for allocation of indirect/ common expenses is the most reasonable method which had been consistently followed by the Appellant in the preceding years and duly accepted by the revenue authorities.

28. Reliance in this regard is placed on following decisions –

- CIT vs. IBM Global Services India (P.) Ltd [2020] 429 ITR 386 (Karnataka)
- CIT vs. EHPT India (P.) Ltd. [2013] 350 ITR41 (Delhi)
  In a case where alternative methods of apportionment of the expenses are recognized and there is no statutory or fixed formula, the endeavour can only be towards approximation without any great precision or exactness. If such is the endeavour, it can hardly be said that there is an attempt to distort the profits. On the contrary, distortion of profits may arise if the consistently adopted and accepted method of apportionment is sought to be disturbed in a few years, especially in a case such as the

instant one where the deduction under section 10A is available over a period of ten years and only in some years the method of apportionment of income is disturbed.

29. Hence, we find that the reasons given by the Revenue and the case laws relied there upon cannot be said to be reasonable grounds to reallocate the expenses in existence of the facts contrary to the decision taken by the ld. DRP. The appeal of the assessee on this ground is allowed.

Ground Nos. 5 & 6

Increase in Capital Reserve:

Deduction of Rs. 26,78,37,118 paid to the employee towards compensation for cancelled stock award:

30. This issue relates to proposed addition of Rs.37,82,75,381/- towards increase in capital reserve, which was on account of contribution received from group company to reimburse the amount paid on cash settlement of the employee award program and disallowance of additional claim for deduction of Rs.26,78,37,118/- paid to the employee towards compensation for cancelled stock awards.

31. It is submitted by the assessee that the stock options granted by IBM to the employees of the CRM business of IBM including those of the assessee were cancelled as a result of transfer of the said business by IBM to Synnex since the said employees would no longer be a part of IBM, The compensation of the said costs could have been by way of adjustment of the sale consideration paid by Synnex to IBM for acquisition of the

CRM business or by way of reimbursement of the actual expenditure incurred towards such cancellation, which was the mode adopted in the present case. The said reimbursement, therefore, represents a reduction in the acquisition cost of shares of the assessee acquired by Synnex from IBM, In the Indian context, since the affected employees were the employees of the assessee, the assessee was obligated to compensate them for the loss suffered by them due to cancellation of the unvested stock options. It is further submitted that the assessee and its employees did not have any claim on Synnex towards such compensation and the amount of Rs.37,82,75,381/- was received by the assessee as one-time voluntary contribution by Synnex and not as a consideration for provision of any services or in any other manner in the ordinary course of business. It is, accordingly, argued that the said contribution qualifies as a capital receipt and cannot be brought to tax in the hands of the assessee. It is also said that mere change in the settlement mechanism between the Buyer (Synnex) and IBM (Seller) and subsequent contribution by Synnex of an equivalent amount to the assessee would not impact the taxation of the assessee.

32. The directions of the ld. DRP on this issue are as under:

> *"The AO has returned a finding that the assessee has treated the payment made to its employees as revenue in nature and debited the same from its total income. However, the reimbursement received by it from its parent company of exactly the same amount and exactly the same purpose has been treated as capital by the assessee. There has to be*

uniformity in accounting for the entire transaction. The assessee cannot avail both the benefits of treating the payments made to the employees as revenue and the reimbursement (since there is no profit element in the amount given by Synnex to the assessee company) received for making this payment as capital in nature. He has further held that in the instant case, there was a direct nexus between amount received and the amount paid. The nature, purpose and quantum of the payment were also the same. It was to honor the commitment when Synnex acquired the CRM business of IBM. This is neither a grant nor subsidy. This is a simple reimbursement with no profit element and direct one-to-one mapping. The Panel, therefore, agrees with the AO that there is no way that the assessee could treat the two limbs of the same transaction to be of different nature. The Panel, accordingly, upholds the action of the AO on this count and rejects the objection of the assessee."

33. The facts and arguments of the ld. AR on this issue are as under:

Facts:

- Synnex Corporation ('Synnex') acquired the Customer Relationship Management services ('CRM') business of IBM worldwide. As a part of this acquisition, Synnex also acquired shares of Appellant which was a subsidiary of IBM Corp. The employees of Appellant were covered by the employee reward programme (Centennial Award), pursuant to which the employees of the Appellant were entitled to stocks of IBM. As a part of acquisition of the CRM business, it was agreed between Synnex and IBM that

unvested stock awards granted by IBM to the employees of CRM business of IBM including those of the Appellant would be cancelled and the eligible employees (of the award program) would be compensated through a cash settlement (to be made on December 1, 2015 to employees who continued till such date). It was also agreed between IBM and Synnex that IBM would make payment for an amount equivalent to the sum paid by Synnex or its subsidiaries to the employees towards aforesaid cash settlement (for unvested stock awards and retention bonus).

- Being the employer, the Appellant made a payment of Rs.37,82,75,381/- to its employees towards compensation for cancellation of the unvested stock awards granted under the Centennial Award programme (in addition to a sum of Rs.3,39,13,372/- being retention bonus paid to the employees of the Appellant).

- Synnex made contribution of Rs.37,82,75,381/- (received by it from IBM) to the Appellant.

- On the expenditure side, since the unvested stock awards were granted in earlier years, the amount relatable to the earlier years of Rs.26,78,37,118/- was reported as prior period expenditure and the balance amount of Rs.11,04,38,263/- was reported as the expenditure for the current year (which included a sum of Rs.3,39,13,372/- being retention bonus paid to the employees of the

Appellant) was reported as the expenditure for the current year.

- The Appellant disallowed Rs.26,78,37,118/- (recorded as prior period expenditure), while filing the return of income and thus, deduction of aforesaid amount was not claimed in the return.

Arguments:

- The amount of Rs.37,82,75,381/- was received by the Appellant as one-time voluntary contribution by Synnex and not as a consideration for provision of any services or in any other manner in the ordinary course of business. The contribution was made to protect the capital investment made by the Synnex in the Appellant, in the respondent. Hence, the said contribution qualifies as a capital receipt and cannot be brought to tax in the hands of the Appellant. Such treatment is also in line with the accounting treatment followed towards such receipts which were accounted for as a capital contribution by Synnex to the Appellant.
- Mere change in the settlement mechanism between the Buyer (Synnex) and IBM (Seller) and subsequent contribution by Synnex of an equivalent amount to the Appellant would not impact the taxation of the Appellant.

- Without prejudice to the above submission, addition should be restricted to the amount of corresponding salary expenditure of Rs. 11,04,38,263/- allowed as a deduction

for the current year. The balance amount of Rs.26,78,37,118/- cannot be taxed since deduction for expenditure of equivalent amount has been disallowed as prior period expenditure. Where the contention of the learned AO is accepted that the amount received has a direct nexus with the expenditure incurred by the Appellant, then there has to be uniformity in accounting for the 2 transactions, the addition for the year should be restricted to Rs.11,04,38,263/-.

34. In this case, the amount of Rs.26,78,37,118/- cannot be taxed since deduction for expenditure of equivalent amount stands disallowed as prior period expenditure and the disallowance be restricted to Rs.11,04,38,263/-. The directions of the ld. DRP are affirmed to that extent.

35. In the result, the appeal of the assessee is partly allowed.
Order Pronounced in the Open Court on 05/03/2024.

Sd/-
(Saktijit Dey)
Vice President

Sd
(Dr. B. R. R. Kumar)
Accountant Member

Dated: 05/03/2024
Skubodh Kumar/NV, Sr. PS

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR